

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,190

309

THOMAS WHITE, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

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Cr. No. 722-65

QUESTION PRESENTED

In the opinion of appellee the following question is presented:

Whether there was sufficient evidence to corroborate the complainant's testimony that appellant had broken into her home and raped her when independent evidence established that police officers arrived on the scene and caught appellant attempting to flee, the appellant's house had been broken into, medical examination of the complainant showed recent intercourse, seminal stains were on complainant's clothing and bed, and the complainant's husband had been away from home in the hospital for six days?

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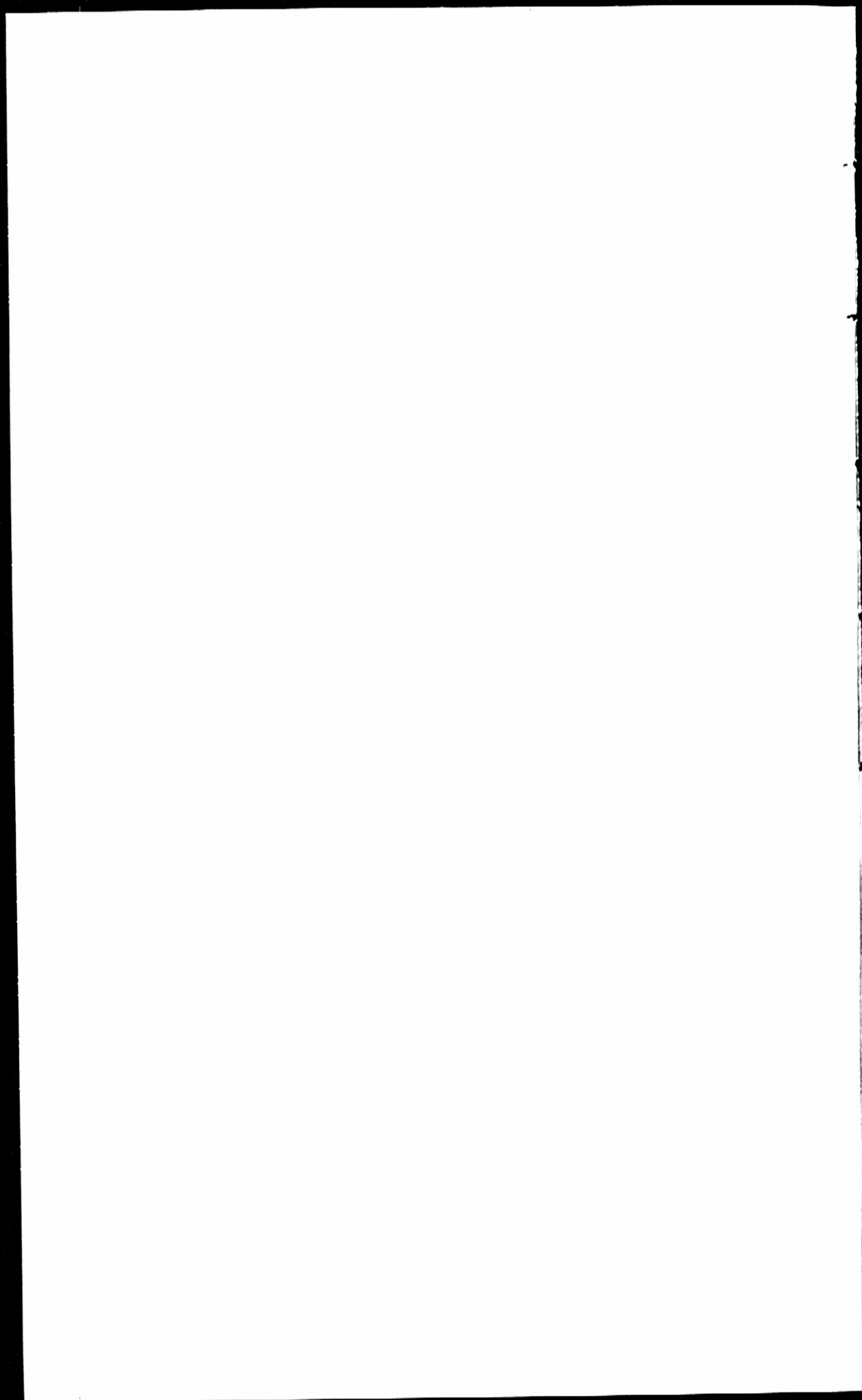
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THOMAS WHITE, JR., APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A three count indictment charging appellant and a co-defendant, William H. Smith, with housebreaking with intent to commit an assault, housebreaking with intent to commit larceny, and rape, in violation of 22 D.C. Code §§ 1801, 2801 was filed in the District Court on June 29, 1965. Appellant was tried by a jury¹ and found guilty

¹ Appellant was tried jointly with Smith who was found guilty of house-breaking with intent to commit an assault (Tr. 222). See *Smith v. U.S.*, No. 19,916, affirmed by judgment October 10, 1966.

of housebreaking with intent to commit assault and rape as charged in counts one and three of the indictment. On December 23, 1965 appellant was sentenced to imprisonment under the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010(b).

Alice Butler who resides at 1806 Bay Street in Southeast Washington was home alone in the early morning hours of May 16, 1965 (Tr. 20). She had gone to sleep in her bedroom on the second floor of her home sometime after 1:30 A.M. and was later awakened by the sound of breaking glass. As she went to investigate the noise, she stopped to telephone the police (Tr. 21, 22). She then noticed one man running up the stairs toward her and another man standing outside her front door. The one who had run up the stairs grabbed her, took her into a small bedroom, removed her pajama bottoms and underpants and attempted unsuccessfully to rape her (Tr. 23, 35, 39-40). The man then dragged her into a larger bedroom, threw her on the bed and raped her (Tr. 23-24, 35). When the act was completed the man stood up in front of the bed and asked for money. When she denied having any, he threatened to shoot her if he found any (Tr. 24).

As her assailant was leaving the bedroom Mrs. Butler heard voices downstairs (Tr. 24). At this point the appellant was going down the steps (Tr. 25, 34, 38). She jumped out of bed and saw the police, then went back to the small bedroom, put on her nightclothes, and ran downstairs (Tr. 25, 47, 60). Finding two police officers there she told them she had been raped and identified the appellant as the man who had raped her (Tr. 25, 43).

Mrs. Butler further testified that the pajama pants which she wore that night were a gift from her daughter on Mothers Day in May 1965 and had never been worn before (Tr. 116, 117). The underpants worn that night had been freshly laundered and put on that morning (Tr. 117, 119). It was her custom also to put fresh sheets on her bed every week-end (Tr. 117-118). Mrs. Butler testified also that her husband had been hospital-

ized since May 10, 1965 (Tr. 20, 21, 56, 121), that she was not sure whether she had ever seen appellant prior to May 16th (Tr. 34); that no other man had visited her home that evening (Tr. 38); and that she had done no drinking prior to retiring that night (Tr. 37-38).

Officers Davis and Untch received a radio run at about 2:30 A.M. in response to Mrs. Butler's telephone call and responded to her residence, arriving there within three minutes (Tr. 71, 78). They observed a man identified as Smith standing on the porch and went up to talk to him (Tr. 71, 78). At this time they noticed that the glass on the front door had been broken (Tr. 71).

The officers also observed a second man, identified as appellant, running down the stairs inside the house, running to the back of the house, and fumbling with the lock on the back door (Tr. 72, 73, 88). Both officers called appellant who came to the front door and let the officers inside the house (Tr. 72, 88). Appellant told the officers that Smith was a friend of his, that everything was alright, and that the screaming they heard was his wife and that she screamed frequently (Tr. 72, 88). At this point Mrs. Butler came running down the steps screaming that she had been raped (Tr. 72, 88).

When appellant and Smith were arrested they were "patted down" at the scene to make sure they did not possess any concealed weapons (Tr. 78, 91). A portion of a metal handle, identified as coming from the door of Mrs. Butler's house (Tr. 73)² was found on Smith either at this time or at the stationhouse when all of Smith's property was removed from his person before he was locked up (Tr. 91).

Expert testimony showed that seminal stains were found on the complainant's pajamas, underclothes, and sheets; and that such stains are soluble in water and easily removed by laundering (Tr. 109-115). Further testimony established that the door handle in Smith's possession matched the lock assembly removed from Mrs.

² Mrs. Butler testified that the door handle had not been broken prior to the night in question (Tr. 28).

Butler's front door (Tr. 122-123). Finally, a physician had examined the complainant less than three hours after the offense and found male sperm cells in the vaginal cavity (Tr. 135-136).

The entire defense of both defendants was rested upon the appellant's testimony. Appellant testified that on the night in question he had gone to Winston Weaver's house to shoot some pool, leaving some time after 11 P.M. to catch a bus at 13th and D Streets (Tr. 144, 153, 154). When no bus came, he decided to walk along the bus route and arrived in the area of 1806 Bay Street around 12:15 A.M. (Tr. 144). He then heard a woman scream and went up on the porch of Mrs. Butler's house. When he heard her yell for help, that someone was in her house, he entered through the open storm and inner doors (Tr. 145, 156-157). As he was standing there talking to Mrs. Butler, the police arrived and he saw Smith for the first time. He denied that he ever went up the steps or grabbed Mrs. Butler (Tr. 146). While he was telling the police he heard a woman screaming and entered the house to investigate, Mrs. Butler ran down the steps and said she had been raped (Tr. 147). He testified that neither Officer Untch nor Officer Davis had searched him at the scene, and that he had not seen either officer search Smith (Tr. 147, 148). He also testified that he had known Smith since 1960 and that they were good friends (Tr. 151, 152).

STATUTES INVOLVED

Title 22, Section 1801 of the District of Columbia Code provides:

"Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or

chattels are deposited and kept for the purpose of trade with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

Title 22, Section 2801 of the District of Columbia Code provides:

"Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty", in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section."

SUMMARY OF ARGUMENT

A positive identification of the accused by the prosecutrix together with independent evidence given by police officers, a physician, and other technical experts is sufficient corroboration of rape to support the jury's verdict.

ARGUMENT

Where prosecutrix has made a positive identification of the accused, independent evidence given by police officers, a physician, and other technical experts is sufficient corroboration of rape to support the jury's verdict.

Appellant argues that the jury's verdict should be reversed on two grounds (1) that the victim's identification of appellant is of doubtful value, citing *Franklin v. United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) and (2) that there was insufficient corroborating evidence to establish the fact of rape. He cites as authority

Franklin v. United States, supra; *Kidwell v. United States*, 38 App. D.C. 566 (1912)³ and *Walker v. United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955). Both of appellant's arguments are without merit.

(1) Identification of appellant

(Tr. 23, 24, 25, 38, 43, 72, 73, 88)

The record discloses that a street lamp in front of victim's house provided some light and that when appellant charged up the steps in her home "you could see pretty clear" (Tr. 23). The victim had from 5 to 10 minutes within which to observe her assailant at close range (Tr. 38), first in the small bedroom, then in the large bedroom, and finally when appellant stood at the foot of her bed and demanded money (Tr. 23-24). Despite the semi-darkness in her home this was ample opportunity for the victim to observe and remember appellant's features. Moreover, the record shows that after the attack the victim followed appellant down the steps and immediately identified appellant to the police officers who had then arrived (Tr. 25, 43, 88). Further identification by the victim was made at the trial (Tr. 25).

In *Franklin v. United States, supra*, the victim had been raped by several persons while her escort had been held at bay. During the course of the attack her face had been covered by a coat. She testified that she was unable to see appellant's entire face, her escort was unable to identify appellant, and finger prints of the other assailants were found at the scene but not those of appellant. In these circumstances this court properly found that proof of identification by the victim was inadequate to

³ In *Kidwell v. United States, supra*, the jury's verdict was reversed, the court holding that the jury had relied solely on the testimony of prosecutrix who was known as an "incorrigible character" without further corroboration. The *Kidwell* rule requiring corroboration was interpreted in *Ewing* and *Walker, infra*, to require only that there be some circumstantial evidence to support a charge of rape.

support the jury's verdict without some corroborative evidence which was not available.

This Court did not, however, lay down the blanket rule that corroborative evidence as to identity is required in every case even where, as in the instant case, the victim made a positive identification which was based on observation. The court's opinion makes this plain:

"Perhaps in the circumstances of a particular case, a convincing identification by the complaining witness based on adequate opportunity to observe need not be further corroborated * * *" (page 209).

This Court reaffirmed its earlier holding in *Walker v. United States, supra*, that corroboration "in the sense that there must be circumstances in proof which tend to support the prosecutrix' story" is all that the law requires.

"The latest expression of this Court as to the need for corroboration in proof of rape is *Walker v. United States* * * * We adhere to the teaching of that case" (at page 208).

See also *Ewing v. United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776.

In the instant case, the complainant made a clear and positive identification. Moreover, the record showed exceptionally strong corroboration, as strong as could ever be expected in cases of this nature, in the testimony of two police officers who arrived on the scene during the rape and caught appellant running down the steps away from the complainant's bedroom and attempting to flee by way of the back door (Tr. 72, 73, 88).

(2) Corroboration which establishes the fact of rape

(Tr. 25, 43, 72, 78, 88, 109, 110, 111, 135, 136, 145, 146)

The record is replete with independent evidence of the *corpus delicti*. The victim reported the attack and identified the attacker to the police immediately (Tr. 25, 43).

Prompt report to the police is one of the most universally accepted forms of corroboration, *Hughes v. United States*, 113 U.S. App. D.C. 127, 129, 306 F.2d 287, 289 (1962). Both arresting officers observed appellant as he ran down the steps from the victim's bedroom where he had no right to be (Tr. 72, 78). The examining physician found the victim in an apprehensive and nervous condition (Tr. 135) and the vaginal examination of victim disclosed the presence of male sperm (Tr. 135-136). Laboratory tests of the victim's clothing and bed sheets disclosed seminal stains, and the victim testified that these articles of clothing and sheets were either new or freshly laundered (Tr. 109, 110, 111). Evidence showed that the lock on the front door of victim's home had been broken open, that her husband had been hospitalized for five days before the attack, and that she had been alone that evening. Except for the testimony of an eyewitness it is difficult to conceive what additional proof could be submitted to corroborate the victim's story. Appellant's highly incredible explanation for his presence in victim's house given at the trial (Tr. 145-146) is inconsistent with his explanation given at the time of his arrest (Tr. 72, 88) and is not worthy of belief.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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